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Supreme Court, U.S.
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NO. 85-659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALWIN E. HOPFMANN,

Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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89 pgs

QUESTIONS PRESENTED

I. Questions Presented By The Dismissal Of Appellant's Complaint To The Federal Election Commission

1. Does a federal administrative agency, charged with enforcement of the federal election laws passed by Congress, and with the task of developing a body of de facto precedent now embodied mainly through its Advisory Opinions, have authority to, or indeed may it, base an Advisory Opinion dismissing an administrative complaint in part upon deference to, or acceptance of, a state court advisory opinion that places a new interpretation upon the federal Constitution that conflicts with the unanimous opinion of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes,) and Art.I, Sec. 4, Cl. 1, as well as the First, XIVth and XVIIth Amendments

in that this Advisory Opinion sanctions a political party adding to state election laws in defiance of the state legislature under a claimed First Amendment freedom of association; or, does that agency, in so basing its opinion, surreptitiously and improperly overturn Smiley in a manner to render its decision erroneous ?

2. Does the mere "possibility" of a "write-in" candidacy, which this Court has indicated is of dubious validity as a substitute for ballot access improperly denied in Lubin v Panish, 414 US 709, and McCarthy v Briscoe, 429 US 1317, and which this Court in US v Classic, 313 US 299, held was not enough to prevent an otherwise improper constriction upon ballot access from being unconstitutional, in the situation where no blank space for a "write-in" is provided on the ballot, does

such a mere "possibility" make a legislatively repudiated and unsanctioned pre-primary convention not an "election" under the definition of 2 U.S.C. 431 (1) (B); or, is that contention, upon which the FEC here based its dismissal, erroneous ?

3. Even if the so-called authority by which a party pre-primary convention eliminates all but one candidate from a primary ballot, resulting in a "no-contest" primary, is unconstitutional, yet if this authority is nonetheless exercised by state and party officials under color of a claimed First Amendment right to be able both privately and without delegation from the legislature, and, in fact, in defiance of the legislature, to "add" to the state statutory scheme, so as to provide the color of state law to their actions, is this not an "authority to

nominate a candidate" at that convention as a matter of law, so as to make even an illegal pre-primary convention an "election" under the clear language of 2 U.S.C. 431 (1) (B), since, absent any attempt at a write-in campaign, the actual primary contest has been terminated ?

4. Is it not arbitrary, capricious, and an abuse of discretion for the Federal Election Commission, which had previously advised in its Advisory Opinions, which have the power of judicial orders and effectively set precedent, that the elimination of candidates at a convention, where those same eliminated candidates did not then institute any sort of challenge, including a "write in," made the candidate-eliminating convention an "election" under 2 U.S.C. 431 (1) (B) as being "tantamount to an election," to

suddenly change its established holding and decide that the mere "possibility" of a "write-in" candidacy even where that possibility is not exploited, makes a convention that eliminates all candidates save one from the ballot not an "election" as previously held under that statutory section ?

5. Is it not arbitrary, capricious, and an abuse of discretion for a federal agency, upon receipt of a complaint of an alleged violation of the laws it is entrusted with enforcing, to take the representation of the party complained of at face value as to what is an accurate analysis of State law pertaining to the power and role of a political party convention in the nomination of candidates for Federal office, when the documents accompanying the administrative complaint

show clearly that the so-called "State law" alleged by the party complained about is merely a non-binding advisory opinion and a distortion of a claimed right under the First Amendment to the Constitution of the United States and, further, not to do research or make any independent analysis of that representation of the party complained about ?

II. Questions Presented As A Result of Appellant's Challenges Pursuant To 2 U.S.C. 437h

6. Did this Court mean what it said in its unanimous opinion in Bread Political Action Committee v Federal Election Commission, 455 US 577, (1982) when it said that "the plain language of Section 437h(a) controls its construction, at least in the absence of 'clear evidence,'...of a 'clearly expressed legislative intention to the contrary,'"

and does, therefore, that mandate hold with regard to the language of 2 U.S.C. 437h (a) where it says that: "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc"; or, does that clear language not mean what it says, but rather mean that only certain questions, those considered by the district courts as not "frivolous" must be so certified, not referring to the finding of frivolity as pursuant to the inherent powers of the court, but rather as pursuant to a specific statutory mandate set out in the In Forma Pauperis Statute, 28 U.S.C. 1915, as stated by the district court for the Eastern District of California in Gifford v Congress, 452 F Supp 802 (ED Cal 1978), as footnoted earlier by the majority of

this Court in Note 14 to the opinion in California Medical Association v Federal Election Commission, 453 US 182, (1981) ?

7. If this Court did not mean what it said in Bread Political Action Committee, supra, should the serial assertion of the use of the In Forma Pauperis statute (As relied upon in Gifford, supra) as one of number of restrictions upon "the potential abuse of Section 437h" [of the Federal Election Campaign Act, 2 U.S.C. 431, et seq.] along with a number of other such restrictions in Note 14 of California Medical, supra, be expanded and taken out of its immediate context so that the explicit statutory provision of 28 U.S.C. 1915 concerning the mandate to district courts to make a preliminary finding of frivolity or lack thereof is surreptitiously expanded by action of the lower

court to embrace the situation where no such explicit mandate applies, and, in fact, where 2 U.S.C. 437h mandates the "immediate" certification of "all" constitutional questions, bypassing the first two levels of the normal federal judicial process, and where the preceeding footnote, Note 13, characterizes such efforts as "rewriting Section 437h" and states that the "remedy" for "criticisms" of the statute is with Congress ?

8. Can the procedural mandate of 2 U.S.C. 437h commanding the district courts to certify immediately, as a matter of procedure, "all" constitutional questions raised about the Federal Election Campaign Act, 2 U.S.C. 431 et seq., to the full panel of the court of appeals sitting en banc be ignored and defied based on the desire of the district court to avoid that

mandate as expressed in clear language and substitute in its stead an expanded interpretation of the application of the "frivolity" provision of the In Forma Pauperis Statute, supra, pursuant to the Footnote in California Medical, supra, so as to overturn the long established principle under the Separation of Powers that Congress and not the judiciary shall set procedure for the inferior federal courts as set out 150 years ago in Wayman v Southard, 23 US 1, (1825), followed by Keary v Farmers & Merchants Bank, 41 US 89 (1842), and Railway Co. v Whitton's Adm'r, 80 US 270 (1872) ?

9. Can the jurisdictional mandate of 2 U.S.C. 437h commanding the bypassing of the first two levels of the normal federal judicial process and the immediate certification of all constitutional challenges

to the Federal Election Campaign Act to the courts of appeals sitting en banc be defied and avoided by the lower federal courts based on the aforesaid expansion of a footnote, so that the district courts retain jurisdiction and even pass upon the merits of some of the constitutional challenges raised, in reversal of the longstanding precedents of this Court holding that Congress shall set the jurisdiction of the inferior federal courts in Jecker v Montgomery, 54 US 498 (1852), Ex Parte McArdle, 7 Wall 506, 514 (1869) and Kline v Burke Constr. Co., 260 US 226 (1922) ?

10. Can lower federal courts defy the former mandates of 2 U.S.C. 437g and h that cases thereunder be moved to the head of the calendar ahead of all other cases and thus delay the cases so that justice shall be denied ?

11. Can the following questions concerning the constitutionality of the provisions of the Federal Election Campaign Act, 2 U.S.C. 431 et seq., raised in a suit pursuant to 2 U.S.C. 437h, be held to be "frivolous" under the In Forma Pauperis Statute, 28 U.S.C. 1915, as expanded in this Court's footnote in California Medical, supra, so as to justify a court's defying the clear language of 2 U.S.C. 437h and refusing to certify them immediately to the full panel of the court of appeals sitting en banc, given that almost all of them have been raised in congressional testimony, in the Congressional Record, or by federal judges:

A. Does the advisory opinion power granted in 2 U.S.C. 437f and empowered by 2 U.S.C. 437d (a)(7) and now used to

propound what are effectively case law decisions (in the place of what should be a body of properly developed federal regulations) violate the "case or controversy" requirement of the Constitution in that 2 U.S.C. 437g, as it has been applied regarding enforcement, allows the FEC to act as a court and to use its own Advisory Opinions, which have been developed apart from the standard pattern for the development of new federal regulations (comprised of hearings, followed by posting for public comment and congressional review, and with a pause before implementation), as if they were law, a practice in which the FEC has continually been engaged as witnessed in congressional testimony and court proceedings ?

B. Does inclusion of a senate employee and officer, the Secretary of the Senate,

on the Federal Election Commission sitting without vote pursuant to 2 U.S.C. 437c (A)(1) violate the "Separation of Powers" requirement of the Constitution, particularly where, as here, the FEC must rule upon a complaint against an incumbent member of the senate ?

C. Are the advisory opinion powers of 2 U.S.C. 437d (a)(7), together with the enforcement power and authority granted by 2 U.S.C. 437g, so ultra vires under the rule of U.S. v Storer Broadcasting Company, 351 US 192; CAB v Delta Air Lines, 367 US 316; National Petroleum Refiners Ass'n v FTC, 340 F.Supp. 1343 (D.C.D.C. 1972) that they violate the requirements for a standard upon delegated congressional authority under the Constitution ?

D. Do the advisory opinion powers delegated to the FEC by 2 U.S.C. 437f as

empowered by 2 U.S.C. 437c (A)(1), together with the enforcement power and authority granted by 2 U.S.C. 437g, constitute an invalidly delegated grant of the power placed in each House of Congress by Art. I, Sec. 5 to judge the elections of its own members ?

E. Do the powers mentioned in D. above violate the Times, Places and Manners Clause, Art. I, Sec. 4, Cl. 1; the constitutional right to a jury trial associated with right to petition for quo warranto; the right to petition for redress of grievances under the First Amendment; and the rights of equal protection, due process and fairness under the Fifth and Fourteenth Amendments in that the resulting enforcement procedures can and do, as they did in this case, favor the party complained about in a biased fashion and deny an effective

remedy where the complaining party, as here, is the opposing candidate actually injured by the actions complained of ?

12. In the face of the mandate of 2 U.S.C. 437h that "all" constitutional questions be certified immediately to the full panel of the court of appeals sitting en banc, may the district court consider and render an opinion on some of the constitutional challenges that a plaintiff brings pursuant to that provision, thus defying the clear language of the statute bypassing the district courts, while ignoring others of the challenges raised, and asserting an authority to dismiss all of the challenges pursuant to 28 U.S.C. 1915 as claimed to be enlarged by the lower courts by virtue of the authority of the footnote in California Medical, supra?

13. As a matter of fairness, where the FEC has delayed twice for substantial periods by missing filing deadlines for reasons such as "high turnover on the staff" and other similar reasons and been routinely granted filing extensions, is it proper for the appeals court to attempt to dismiss the complainant's case for the reason, inter alia, that complainant, who was, in an almost unheard of action, denied permission (pursuant to Rule 40(c) of the Federal Rules of Appellate Procedure) to file the appendix after the filing of the answer by the FEC, where the court gave the complainant 10 days after denying his Rule 40 (c) motion to file a voluminous appendix, which wound up being three volumes in length; and where complainant then missed the filing deadline by two days for reasons similar to those for which the FEC was granted

time extensions; and the court's deputy clerk then went on vacation and failed to notify the complainant that the filing failed to comply with the part of the court's rules dealing with the physical binding of these appendices, so that the appendix was not brought into conformity with the rules until several weeks later; and, unquestionably, no substantial prejudice resulted ?

NO._____

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

No._____

ALWIN E. HOPFMANN, Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION,
EDWARD M. KENNEDY, and
THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRCT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ALWIN E. HOPFMANN, the petitioner herein, prays that a writ of certorari issue to review the judgment of THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT entered in the above-entitled case on May 13, 1985.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

No. _____

ADMIN E. SOFFMANN, Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION,
EDWARD M. KENNEDY, and
THE COMMITTEE TO RE-ELECT EDWARD KENNEDY,
Respondents.

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To the Honorable, the Chief Justice
and Associate Justices of the Supreme
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ADMIN E. SOFFMANN, the petitioner
herein, prays that a writ of certiorari
issue to review the judgment of THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT entered in the above-
entitled case on May 13, 1985.

OPINIONS BELOW

The opinion of the defendant/respondent Federal Election Commission, in the form of an EXPEDITED FIRST GENERAL COUNSEL'S REPORT dated October 22, 1982, was unreported. It was adopted by the FEC, under applicable case law, as its opinion in communicating to complainant/petitioner Hopfmann its dismissal of his administra-tive complaint in its communication to him of October 25, 1982. This opinion-report is reproduced in the appendix, Vol. 1, appendix A. The opinion of the United States District Court for the District of Columbia, granting summary judgment to the FEC as to plaintiff/petitioner Hopfmann's petition-appeal to that court of the dismissal of his administrative complaint and also dismissal of his challenges to various provisions of the Federal Election Campaign Act, (FECA), was reported in CCH

Federal Election Campaign Financing Guide Par. 9203. The decision of the United States Court of Appeals for the District of Columbia, affirming the decision of the district court with a memorandum under Local Rule 8(b), from which this petition for the writ of certiorari is taken, was reported at 762 F2d 138 (table) and portions selected by the FEC were reported by the FEC in the FEC RECORD, Vol. 11, Number 7, July, 1985. The district court opinion and order and the memorandum opinion of the court of appeals affirming it are reproduced in the appendix, Vol. 1, appendices B and C.

STATEMENT OF THE GROUNDS ON WHICH THE JURISIDICTION OF THIS COURT IS INVOKED

The petitioner ALWIN E. HOPFMANN seeks review of the judgment and opinion of the United States District Court for the District of Columbia rendered and entered on March 8, 1984, as affirmed by a judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia pursuant to Local Rule 8(b) that were entered on May 13, 1985. Local Rule 8(b) forbids publication of a memorandum opinion issued under it. Nonetheless, the FEC published excerpts from the memorandum opinion, which it selected, in its official FEC RECORD of July, 1985, Vol. 11, Number 7, which goes out to most candidates and to those who

support candidates.[1] A petition for

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[1] There were other, more peripheral, reports and opinions below, growing out of the attempts of the petitioner Hopfmann to get the courts to heed the expediting mandates of the statutes. For this March, 1984, decision in the district court was over a year after petitioner/ appellant Hopfmann filed with the district court under 2 U.S.C.437g(a)(8)(A) on December 26, 1982, to appeal the dismissal of his administrative complaint and over a year after petitioner amended that complaint to add his allegations of unconstitutionality in the FECA as applied in this instance pursuant to 2 U.S.C. 437h on February 17, 1983. This delay was in the face of the mandate of 2 U.S.C. 437g(a)(10) as then in effect that all actions brought under the former subsection were to be "advanced on the docket of the court...and put ahead of all other actions" other than constitutional challenges brought under the latter section. Challenges pursuant to 2 U.S.C. 437h were to be certified "immediately" to the full panel of the court of appeals by 2 U.S.C. 437h(a) and, once there, according to 2 U.S.C. 437h(c), as then in force, it was the duty of that court (and this Court as well, under a 20 day appeal as a matter of right in the event of a negative decision in the court of appeals full panel) to advance the case on the docket and "expedite it to the greatest possible extent." Had these mandates been obeyed, this case would have been before this Court years ago. After reminders to the court in documents filed that statutory mandates for expedition

(Continued)

were unheeded, petitioner Hopfmann Moved to Expedite. Petitioner then filed for mandamus with the court of appeals on the same day that the district court granted the FEC summary judgment and dismissal, March 8, 1984. Pointing out that the language of 2 U.S.C. 437h is not discretionary, petitioner asked nonetheless that the mandamus request be heard. It was denied on July 10, 1984, along with several other motions of the petitioner requesting adherence to the language of 2 U.S.C. 437h. The court of appeals issued an Order saying the denial was without prejudice to the merits of any arguments appellant Hopfmann might propound during the ordinary course of the appeal and the denials were because the appeal afforded the appellant "'adequate means to attain the relief he desires,' Kerr v. United States, 426 U.S. 394, 403 (1976)(denying mandamus)." The appeals court, however, never did take up the question of the meaning of the language of 2 U.S.C. 437h mandating certification of all constitutional questions in the regular course of the appeal because it affirmed and echoed the holding of the district court interposing a doctrine of having a threshold power derived from the "frivolity" provision specifically stated in the In Forma Pauperis Statute, 28 U.S.C. 1915, as a preliminary finding which the courts must make with regard to the impoverished litigant, as expanded by the district court based on a line from footnote 14 of the opinion of this Court in California Medical Political Action Committee, 453 US 182, under which, despite this case's not being under that statute, the district court has the

rehearing was filed in a timely manner and was denied on July 19, 1985.

AUTHORITY CONFERRING JURISDICTION FOR REVIEW BY THIS COURT

The jurisdiction of the Supreme Court is invoked under the United States Constitution, Art. III, Sec. 2, Cl. 2, and under the statutes 28 U.S.C. 1254 (1), and 28 U.S.C. 2101.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS WHICH THE CASE INVOLVES

(Continued)

authority to decide that constitutional questions raised pursuant to 2 USC 437h are "frivolous" in its eyes and do not have to be certified in accordance with the clear language of the statute. Accordingly, petitioner, still reading the statute to mean what it says and as not discretionary, petitioned this Court for a stay in the matter. This petition was denied on October 19, 1984, by the Chief Justice. It was referred to Madame Justice O'Connor on October 25, 1984, and was denied by the Court on November 5, 1984.

Art.I, Sec.4, Cl.1, the "Times, Places and Manner Clause;" Art.I, Sec.5, Cl.1; Art.I, Sec.7, Cl.1; Art.I, Sec.8, Cl.9; Art.II, Sec.1, Cl.1; Art.III, Sec.1; Art.III, Sec.2, Cl.1, "Case or Controversy Requirement"; Art.VI, Cl.2, "Supremacy Clause;" First Amendment; Fifth Amendment, Seventh Amendment; XIVth Amendment; XVIIth Amendment; Mass. Gen. Laws, Chpt. 53, Secs. 2,6,10,44, former Secs. 54, 54C and 54D; Chpt. 54, Secs. 28, 41; 1973 Mass. Acts c.439; The private rule passed by the inner group of the Massachusetts Democratic Party contained in its Party Charter adopted in 1982 and implemented to exclude petitioner from the ballot at a pre-primary convention repudiated by the legislature, is known as Massachusetts System. This rule is considered by the petitioner to be a private party rule with no force of law, but by the party insiders and officials who have enforced it is

claimed to be a "law" by virtue of the First Amendment freedom of association. This rule, and the question of whether or not it is a law, form much of the basis of the present controversy. 2 U.S.C. 431(1)(B), (8)(B) (ii), (iii), (iv), (v), (9)(B)(ii) and (iv); 432(f); 434(a) (1), (2)(A)(i), and (6)(A) and also (b); 437c(A)(1); 437d(a) (7) and (9) and (e); 437f; 437g(a)(1) through (3) and (4)(B)(1), (8),(9),(10), (12),(b); 437h, 441(d)(3)(a), (all as of 1982 and as continued thereafter; 28 U.S. C. 1915; 28 U.S.C. 1928; Text in appendix.

STATEMENT OF THE CASE

There are two cases here, though one (the constitutional challenges to the FECA under 2 U.S.C. 437h) grows out of the other. Both cases arise from the administrative complaint filed by petitioner with the FEC against Senator Kennedy and his campaign committee in the 1982 senate race.

So it is important to understand the basis of that administrative complaint. In 1982 petitioner, long an active "Pro-Life" Democrat in Massachusetts, entered his party's primary race against Senator Kennedy. To that end he met every requirement of the state statutory scheme for ballot access, principally by collecting 10,000 registered voter signatures.

Despite having qualified under the statutes as written by the legislature, petitioner was not allowed on the ballot

for the statewide primary, held on September 14, 1982, by the state official in charge of ballots, Secretary of State Michael Joseph Connolly. Mr. Connolly stated that he was following a party rule, which requires candidates to attend a pre-primary convention of a small number of members of the party (1/4 of 1 percent) and get a percentage (15%) of their votes.

This Massachusetts System convention is not approved or authorized in the written statutes and the legislature had defeated 8 bills seeking to authorize such party pre-primary conventions. Previously, in 1973, the legislature had revoked authority for party pre-primary conventions, even conventions which only had the power to declare a party "endorsee." In 1982 the legislature passed a bill repudiating this unsanctioned convention scheme and reaffirming the statutory method of

nomination signatures as the sole method of ballot access.

However, the governor declined to sign the bill, deferring because the state's highest court's justices had just then issued an advisory opinion asserting primacy of party rulemaking under the First Amendment "Right of Association." An opinion from the state Attorney General was not yet available at the time when the bill would have had to be signed to be entered into the laws. The justices' opinion came under the state's statutes enabling such opinions on a carefully circumscribed, non-precedential basis. Clearly, under the established law of Massachusetts and other jurisdictions such opinions, are, of course, not law, but are merely the personal opinions of the jurists.

To expand on consideration of this advisory opinion, the justices of the

Supreme Judicial Court (SJC) opined as how a party inner group has a right under the freedom of association emanating from the First Amendment to the U.S. Constitution to add their own additional requirements for ballot access to those established by the legislature and that this right compelled a reinterpretation of state statutes to accomodate this right of association. The result was to enable creation of this unique Massachusetts System, where political parties make the election law directly.

The justices held that the state statutes must be found ambiguous and reinterpreted to make way for this newly asserted federal right. Further, they opined, continuing in their individual capacity, that the party rulemakers could actually "add" their additional rules for ballot access to the state statutes by virtue of this right of freedom of

association. In support of this innovative scheme of private lawmaking, the SJC justices cited this Court's opinions in Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981) and Cousins v Wigoda. 419 US 477 (1975). The

Massachusetts System "jaybird"[2] convention

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2 In Terry v Adams, 345 US 461 (1953) this Court addressed the issue of party conventions that have no sanction in a state statutory scheme for ballot access but which nonetheless impose an additions, pre-selection for ballot access upon that which the legislature has embodied in the state statutory scheme. In that case an inner group of the Democratic Party of Fort Bend County, Texas, which called itself the Jaybird Association or Party held the unsanctioned pre-primary convention. Hence "jaybird" convention has become the term among students of this Court and its decisions for such a legislatively unsanctioned pre-primary convention that pre-selects candidates for the ballot. It is in that sense that we use the term in this brief, although it should be noted that the Jaybird Party apparently had the tacit approval and co-operation of the Texas legislature whereas here the opposition of the Massachusetts legislature to the Massachusetts "15 Percent Rule" Convention (Massachusetts Rule Convention or Massachusetts System) is clearly established on the record. Of course, in Terry this Court found that the purpose of the Jaybird Party Convention was to avoid the XVth amendment ban on racial discrimination in the public process of the primary election. But similarly here petitioner contends that the purpose of the Massachusetts Jaybird Convention is to avoid the mandate of the "Times, Places and Manner Clause," Art.I, Sec.4, Cl.1 as interpreted by the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932) (Opinion by Mr.

at which petitioner was excluded from the ballot for failure to get 15% of the votes of the party insiders, and which remains today the central feature of this Massachusetts System, was held May 21 and 22 of 1982.

On the 28th petitioner was excluded from the ballot.

On June 3 petitioner filed suit in the United States District Court in Boston seeking an order to be placed on the September ballot. It is acknowledged that petitioner never attempted to run a write-in campaign.[3]

Subsequently, as the September 14 primary approached, and as other attempts to seek remedies for the usurpation of the

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Chief Justice Hughes) and also the First and Fourteenth Amendments.

3 See the Brief For Appellee Federal Election Commission in the court below, p. 3, n.2: "Appellant Hopfmann...did not attempt a write-in campaign."

primary by this new Massachusetts System met with frustration, petitioner filed his administrative complaint with the FEC seeking to compel the treatment of the pre-primary convention as the "election" he believed it to be under the clear definition of 2 U.S.C. 431(1)(b). He attached to his complaint to the FEC, inter alia, a copy of the SJC advisory opinion which had been the justification for his exclusion from the ballot.

The FEC notified Senator Kennedy and his committee and their attorney answered stating that his clients had done no wrong in complying with the rule and that the Massachusetts System convention was not an election, because the "real" election was not until the official statewide primary September 14. However, Senator Kennedy was the only choice named on a primary ballot devoid even of a write-in blank.

The FEC then, without, it appears, any other inquiry[4] embraced the representations of the attorney for the parties complained about and dismissed the case. The report-opinion on which the dismissal rested made two assertions which petitioner has consistently attacked as error. First, the FEC asserted that under

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4 Indeed, the subsequent report of the district court's affirmance of this dismissal of the admininstrative complaint by summary judgment in CCH Federal Election Campaign Finance Guide, at paragraph 9203 headnoted the case with the statement: "The Federal Election Commission had adequate grounds for concluding that a violation did not occur when it considered the report of its General Counsel and the pertinent materials that a violation did not occur when it considered the report of its General Counsel and the pertinent materials he had provided along with it." It is clear from the record that the General Counsel relied in toto upon the response that he received from counsel for Kennedy and his committee. Had he read the SJC opinion provided by petitioner he would have known that the claim to be able to impose the Massachusetts system upon candidates was based on the First Amendment and not upon the state statutory scheme.

Massachusetts law candidates must attend the convention and get the delegate votes required by the party; and, secondly, that the Massachusetts System convention was not an election as defined in the statute because Mr. Hopfmann could have, had he so chosen, conducted a write-in candidacy.

For the first proposition the FEC cited Sec. 44 of Ch. 53 of the Mass. Gen. Laws, and for the second certain decisions of this Court, namely American Party of Texas v White, 415 US 767 (1974), and Democratic Party of U.S. v Wisconsin, 450 US 107 (1978).

These cases actually, of course, deal with the question of a state's power to make reasonable laws regulating ballot access and not with the "jaybird" type of situtation. There are decisions of this Court in which the question is addressed of a write-in possibility as an adequate alternative to ballot access. These cases

are mentioned below.

Petitioner appealed this dismissal by the FEC to the United States District Court for the District of Columbia. The central question is the question of whether or not the "jaybird" type of convention controlling ballot access in favor of party insiders, though not sanctioned by the legislature, is still, nonetheless, an election because it has been given authority by non-legislative officials to exclude candidates from the ballot.

The statutory definition is that a convention which has "authority" to nominate a candidate is an election.[5] In 1976, this language was adopted in a change from earlier language that had specified as an election a convention specifically conducted to nominate a

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5 2 U.S.C. 431(a)(2)

candidate. The change was made to eliminate (or, at least, to heavily penalize) the holding of conventions whose ostensible purpose was something else, but which wound up nominating candidates.

Petitioner argues that under the clear language of the statute, the Massachusetts System "jaybird" convention had the power to nominate, as conferred upon it by the justices of the SJC and by the Secretary of State.

These acts by the party insiders clearly eliminated Senator Kennedy's only opposition for the nomination.

Petitioner argues that all Advisory Opinions and other published statements of the FEC prior to the institution of this case consistently held that a convention which eliminated all but one candidate in a race was an election, unless the eliminated candidate did institute some kind of challenge procedure.

In short, petitioner argues that the language of the federal statute defining elections is clear and unambiguous (and as a matter of law is unambiguous) so as not to require any specialized expertise in interpretation, which the FEC's own prior pronouncements show. After all, it doesn't take the legal system's equivalent to a biochemical engineer to figure out whether party insiders are using a "smoke-filled room" to eliminate the influence of the rank and file on candidate selection, or whether these insider maneuverings are done with the sanction of quasi-official authority, however dubious that may be in terms of constituting valid law.

The FEC, on the other hand, argues for this specific case that just because the voters of Massachusetts are spared making a choice at the ensuing "real" primary, does not mean that the convention is an election. FEC maintains, Mr. Hopfmann

could have run a write-in campaign, even though they acknowledge that he did not. The Massachusetts System convention is merely a "winnowing out" process.

The FEC argues that its special expertise should be deferred to in intepreting its enabling statute, the FECA. FEC says that the Massachusetts System convention can be ignored, so that this case is analogous to the situation where a candidate is unopposed from the outset, but is nonetheless allowed a separate campaign contribution limit for that unopposed race. The reasoning of its prior Advisory Opinions supporting this position for unopposed races is that the unopposed candidate would be unable to maintain his public visibility vis-a-vis that of his general election opponent, if he is not allowed to "run" an unopposed campaign. The Massachusetts Republicans do not claim the power and have not

attempted use of this Massachusetts System "jaybird" convention to winnow out candidates; thus, Republican candidates have not risked penalty for participation in a nominating convention. So the reasoning may not apply.

Subsequently, the FEC gave an Advisory Opinion reinforcing its views in this regard in response to an inquiry concerning the campaign of one of Mr. Kennedy's fellow incumbents in the Massachusetts House delegation.[6] This opinion was pendente lite and illustrative of the FEC's penchant for using the Advisory Opinion power to make law, which they then seek to enforce upon people by their own devices.

The FEC and the lower court have not addressed the question of whether 2 U.S.C.

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6 FEC AO 1984-16, 1 Fed. Elec. Camp. Fin. Guide Par. 5758

431(a)(2) is clear and unambiguous in its language. The FEC has simply argued, and the lower courts have accepted, that the FEC's special expertise in the ways of party insiders must be applied as if the statute were ambiguous, avoiding the general rule that unambiguous statutes mean what they say.

In addition, the FEC has not acknowledged that the advisory opinion of the SJC, upon which it relied, states that Massachusetts law must defer to an untested reading of the federal Constitution in requiring that the candidates of the Democratic Party must attend this convention and get a percentage of these votes. Nowhere does the FEC acknowledge that this is an interpretation of a claimed right under the First Amendment to the U.S. Constitution.

Instead, the FEC and the lower courts have acted as if this radical claim has,

in fact, made the Massachusetts System a part of state law with no further questions in order. Though pressed by the petitioner as to why a federal agency, which claims expertise in election law matters, would appear to be sanctioning such a radical assertion of federal constitutional law as if the FEC were an appellate court, the FEC has refused to respond. Instead FEC has attacked the petitioner for troubling to raise the question.

Petitioner, in his second case, under the Buckley Provision, see Note 1, supra, which was filed at this point in the district court, attacked the FEC's use of its advisory opinion powers under the FECA as they affect this case, the sitting on the FEC (even as a non-voting member) of the Secretary of the body of which Mr. Kennedy is a powerful member and other things enabled by the FECA along with the

FECA provisions themselves.

The objections, almost without exception, raised by the petitioner in this second part of the action against the FECA had been raised before by a member of Congress, someone testifying before Congress, or by federal judges. None have been resolved.

Nonetheless, after the delay described in Note 1, during which the judge of the district court made it clear that he was not going to even have a conference in the case, the judge of that court, with it evident that mandamus was in the works, granted summary judgment to the FEC on the first case, the one turning on the statutory definition of election, rendering a memorandum opinion that was substantially of the position already taken by the FEC over a year before.

With regard to the challenges brought under the Buckley Provision, the court

treated them disdainfully and dismissed them based on the expansion of the "frivolity provision" of 28 U.S.C. previously discussed. In doing so, however, the court did discuss certain of them on the merits while ignoring others. It is because of this that petitioner now cites additional error in that the statute commands the immediate certification of "all" questions to the courts of appeals en banc panels, admittedly a provision intended to bypass the first two levels of the court of appeals and yet, the district court, while refusing the benefits of this provision, passed on the merits of part of petitioner's case itself.

From the March 8, 1984 summary judgment and dismissal by the district court the petitioner appealed to the court of appeals. The court of appeals, after denying the mandamus and motions as set out in Note 1, supra, set the matter for

oral argument and then changed its mind, apparently deciding that the petitioner and the issues he was raising were of little import. Subsequently the court issued an order and opinion echoing that of the lower court and, as we have noted, ordered the opinion not printed under Local Rule 8b in order that the FEC might circulate it in its own official publications, and particularly the FEC RECORD, excerpting to create its own selected version, without any of the disclaimers the rule commands. This avoidance of Local Rule 8(b) enabled the FEC to do the petitioner, a candidate struggling to emerge from the rank-and-file against one of the most powerful political organizations in the country, the gravest harm, making a mockery of the rule's ostensible purpose.7

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7 In this manner the court of

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appeals has managed to enhance and expand the very extralegal "lawmaking" on the part of the FEC which the petitioner attacks in these proceedings as being beyond what the Constitution allows. For Local Rule 8(b) is the appeals court's version of the advisory opinion power which the petitioner has attacked the misuse of throughout these proceedings and the related proceedings in the first circuit. Under this local rule, the appeals court claims the power to opine about matters in a way that it says is not precedential though it is binding law of the case and which it then orders not reported in the Federal Reporter. The petitioner challenges the use of this device under the particular circumstances of this case on general grounds. But, in particular, in this instance, since the FEC, one of the adversary parties to what is supposed to be a fair proceeding, then published excerpts of its own choosing from this memorandum opinion in its official RECORD, without any disclaimers to reflect the non-precedential nature of the opinion. Because its official RECORD is widely read by candidates for federal office, those who work with them regularly, and their financial supporters, in this way the FEC is able to give it the effect of precedent nonetheless, since the campaign finance community now is given the opinion as an official publication of the FEC without any disclaimer. And, without a reversal on the merits, of course, it does the maximum damage to Mr. Hopfmann as a candidate who desires to run again while the pious fiction of the opinion "not being reported" is preserved. such as the appeals court attached to its

Subsequently, in order presumably to make an example of petitioner for having raised these issues that had been raised in Congress and other places in the courts and having dared, as a would be candidate of the rank-and-file of his party, to challenge the power of the FEC, the court assessed him with over $ 3,000 in attorney's fees for the FEC lawyers.

Two new issues were raised at the court of appeals level. The first is the fundamental one of fairness and due process in the treatment that the courts themselves accorded petitioner, and the second is the question addressed in Note 7

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memorandum opinion, the effect is to send out the opinion in the light least favorable to the petitioner and his case to all those who follow election law and to all other candidates and those who are in the business of assisting candidates in a manner that actually assists and perpetuates, and even expands the very extralegal "lawmaking" by the FEC of which the petitioner complains.

above concerning the propriety of a local rule that establishes dangerous precedent through the auspices of the FEC.

With regard to the fundamental lack of fairness: The FEC was on several occasions granted extensions of time for filings beyond deadlines. The loss of time was substantial. Reasons were given, usually related to poor internal organization, such as people being on vacation and personnel turnover in the office.

The petitioner, on the other hand, missed one filing deadline, when his Rule 40(c) motion for the filing of the appendix after the FEC had answered was denied. This harrassment is almost unheard of in the U.S. Court of Appeals for the District of Columbia, where such motions have been granted as a matter of course for years. The court gave petitioner 10 days to file an appendix in three volumes. When this filing could

only be delivered two days late, and with a trivial nonconformance to appendix binding preference, the court imposed the additional burden of trying to use this situation to avoid hearing the case.

So petitioner now contends that these additional errors add to the fundamental deprivation of his First Amendment right to petition for the redress of grievances and due process and show an unwillingness on the part of the FEC and the court of appeals to adhere to common standards of justice and instead demonstrate, we respectfully submit, a willingness to punish the man who turns to the agency and the courts for redress.

ARGUMENT

There is no sanction in the law for the idea that political parties have private lawmaking authority that entitles them to usurp the lawmaking functions of their

legislatures. State parties may make no change in election laws without specific delegation of authority from the legislatures to do so.

The making of laws regulating the times, places and manner of choosing candidates, including party nominees, is a state function, Smith v Allwright, 321 US 649 (1944); Marchioro v Chaney, 442 US 191 (1979) Though it may be delegated to parties, they may not usurp this state function, particularly to avoid a mandate of the Constitution, Terry v Adams, supra.

The state may delegate the resolution of intra-party disputes to the parties, but the state makes the rules by which the contest must be conducted. Storer v Brown, 415 US 27 (1974); Lubin v Panish, 415 US 709. Care must be taken not to confuse the interests of partisan organizations with governmental interests, Elrod v Burns, 427 US 347, 362.

Yet here FEC embraces the notion that a political party inner group, against the wishes of its own legislature and its own rank-and-file, can "add" laws to those made by the legislature. This case is twofold, brought under two separate statutory provisions. They both stem from the same acts by the FEC and lower courts. But all of the wrongs of which petitioner complains stem from the assault upon the election process by certain of the insiders of his own political party.[8]

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8 Hopfmann, et al. v Connolly, et al., 746 F2d 97 (1984); Hopfmann v Connolly, ___ US __, 105 SCt 2106 (1985) cert. acc. and lower court opinion vacated and remand; Hopfmann v Connolly, 769 F2d 24 (July, 1985). The FEC has noted that petitioner "has raised issues similar to some of those asserted here in a ballot access case brought in the United States District Court for Massachusetts. Hopfmann v. Connolly, No. 82-1530-MC (D. Mass., complaint filed June 4, 1982)." Brief for Appellee Federal Election Commission in the court below, p. 2. The case in the first circuit has paralleled this one in many respects. As here, there was considerable delay in the district

Their Massachusetts System "jaybird"

convention is directly at odds with the

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court and a somewhat patronizing attitude toward the petitioner and his audacity in seeking to enforce the Constitution and the laws. As here, the courts below in the first circuit claimed that the question of whether or not party inner groups have private lawmaking authority was answered in favor of such a claim as a matter of state law by this Court's decision in refusing cert in Langone v. Connolly, 103 SCt 1510 (1983). Here the FEC, like the federal courts in the first circuit, finds that as a matter of state law the state court has interpreted the claimed federal First Amendment right so that federal courts (or agencies acting as courts, such as the FEC) may not inquire into the matter. It will be interesting to see how the FEC now responds in light of this Court's unanimous acceptance of cert in the first circuit case on the first round and the vacation of the lower court opinion on which the FEC previously relied to the extent that, like the FEC, it relied upon Langone, supra. Now the FEC will have to either acknowledge that it was in error in claiming that the Massachusetts "jaybird" system is under state law or it will have to openly acknowledge that it is usurping the function of a federal appellate court by embracing a radical and heretofore unknown theory of constitutional jurisprudence not on the grounds that a state court has interpreted a state statute but rather on grounds that the First Amendment gives such a novel right.

manner which the legislature chose for ballot access as a matter of clear record. The legislature has for 50 years prescribed getting on the primary ballot by the "method of nomination papers," or by the the collection of voter signatures.

The legislature revoked authority for pre-primary conventions in 1973, after 11 years of trying them as an alternative method of ballot access, without disturbing the underlying method of nomination papers. These were endorsing conventions only, with no authority to impose additional conditions upon ballot access. The revoking statute was 1973 Mass. Acts c. 429. The legislature has since 1973 rejected 8 attempts to enact this Massachusetts System into law.

The language of the state statutory scheme is both clear and exclusive. Until the party insiders decided to advance this novel claim to private lawmaking authority

no one had suggested that there was any condition imposed upon ballot access other than those written in the statutes.

The Massachusetts System is thus in violation of the unanimous decision of this Court interpreting the Times, Places and Manner Clause in Smiley v Holm, 285 US 355.

In dismissing petitioner's complaint, the FEC stated unequivocally: "Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party." To support this contention the FEC then cited Mass. Gen. Laws Ann., ch. 53, Sec. 44 (West 1975). This section of Massachusetts law is reproduced in the appendix and contains nothing supporting, authorizing or delegating any sanction for the Massachusetts System.

However, proponents of this System have seized upon the holdings of this Court in Democratic Party of the U.S. v Wisconsin, supra, and Cousins v Wigoda, supra, and have extended these cases beyond what they will bear. Going beyond the notion that a national party rule about delegate selection may not be amenable to control by state laws that would require participation by non-party members in delegate selection, the Massachusetts System asserts a power to make laws and to treat as ambiguous the laws which had always been clear before.

If the FEC had done its research and analyzed the state statutes and had recognized the state statutory scheme, then it would have had to accept that the pre-primary convention at which the party rule was implemented was essentially illegal.

That would have also meant having to accept that one purpose of the Massachusetts System was to escape control of the Times, Places and Manner Clause in order to implement political bossism, just as the aim of the Jaybird Party Convention in Fort Bend County, Texas, was to escape the strictures of the XVth Amendment in order to implement racial segregation.[9]

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[9]Attempts such as the present one by the Massachusetts inner elite to seize candidate control are not unknown in American jurisprudence. But the modern primary system has now been with us so long that something like the Massachusetts system is not attempted as much as it once was. By 1953, when Terry, supra, was decided, Mr. Justice Frankfurter could remark: "Nor is this a case of boss-control, whether crudely or subtly exercised." He then spoke of "The right of all citizens to share in it, ['a process for primary elections'] and not to be excluded by unconstitutional bars." He should still be at Harvard to see the Massachusetts "jaybird" system. This was the same Felix Frankfurter who, in 1924, in a note in the Harvard Law Review, called advisory opinions "Ghosts that Slay."

This would then have forced the FEC to consider whether this convention was, in effect, an election for the Democratic nomination and whether the ensuing primary with only one man on the ballot was no longer meaningful.

Then Mr. Kennedy, as the only candidate surviving the convention, would have had to treat his nominating convention as an election. The question of the limits involving primary and general election differentiation would have appeared.

Title 28 Sec. 1652 does not in any way require the federal courts to defer to state courts on matters of interpretation of the United States Constitution. Quite the opposite: federal courts are required to make their own interpretations of the Constitution, and are the final arbiters of its meaning. So if the lower courts had done in this case what they are required by statute to do, then the state

statutory scheme as written would have been recognized as the binding rule of precedent. Private party rules would not have been recognized by the lower federal courts as part of Massachusetts law.

The FEC itself has long held that in analyzing complaints such as petitioner's, it must look to the state law governing candidate selection, not to private fiat.

Petitioner filed with his FEC complaint a copy of the SJC advisory opinion which Secretary of State Connolly relied upon in excluding him from the ballot. An examination of that opinion would have revealed that the party rule was not contained in the statutory scheme as written by the legislature but rather was claimed to be added to that scheme by the extension of the First Amendment freedom of association claimed by these justices and by the party insiders.

By failing to analyze accurately the actual state law at issue, by failing to regard it as a rule of decision as required by law, the lower courts departed substantially from the accepted and usual course of legal proceedings before the federal courts. The acceptance by FEC and both lower courts of the novel notion that political parties can "add" to state statutes and do so in defiance of their legislatures without delegation of such authority, is in direct conflict with the unanimous decision of this Court in Smiley v Holm, supra.

The FEC asserts that the possibility of a write-in candidacy is what prevents the unsanctioned pre-primary convention at issue here from being an election. It asserted, in its opinion dismissing Mr. Hopfmann's administrative complaint, that the ensuing months of campaigning by the only candidate named on the ballot were

not hollow procedures. In support of this contention they cited opinions by this Court such as American Party of Texas v White, supra.

This is misleading. The cases which the FEC cited do not deal with the question of whether the possibility of a write-in candidacy can convert an otherwise terminated primary election into one that is still going on. White, e.g., deals with the question of whether or not a state government can impose conditions upon primary ballot access that are necessary to keep the ballot and ballot access process orderly. No one quarrels with that contention and it is not at issue in Mr. Hopfmann's case.

What is at issue is whether the unexercised possibility of a write-in campaign can prevent the unsanctioned pre-primary convention from being one that had "authority to nominate" under 2 U.S.C. 431

(1)(B) because only one candidate emerged with access to the primary ballot.

The FEC said, and the lower courts echoed, that the write-in possibility was adequate access to the primary electoral process for petitioner as a candidate in lieu of the place on the primary ballot he qualified for under the statutory scheme. Because of this ongoing possibility, the FEC and the lower courts reasoned, the "election," under the FECA definition, continued beyond the convention. This flies in the face of what this Court has actually said on the subject.

In Lubin v Panish, supra, and after in McCarthy v Briscoe, 429 US 317, members of this Court made it clear that the possibility of a write-in is not an adequate substitute for ballot access. And so it cannot be, as the FEC has asserted and the courts have here upheld, that a write-in possibility can be the determinative

factor in converting a convention that would otherwise be an election into a non-election under the definition of 2 U.S.C. 431(1)(B). This only confirms what this Court held many years before in U.S. v Classic, 313 US 299, that a "write-in" possibility is not compensation for an improper burden upon ballot access.

Thus the FEC and the lower courts have decided a federal question, the adequacy of the possibility of write-in candidacy as a substitute for ballot access improperly denied, in conflict with the decisions of this court that apply.

We urge the Court to grant certiorari and make it clear that the possibility of a write-in candidacy is not sanctioned as adequate compensation for improperly exclusion from the ballot and that such a possibility by itself cannot change whether a nominating convention is an "election" under the definition of the

FECA. It would be dangerous to leave a precedent standing containing or affirming such an assertion on the part of the FEC

Nor is this assertion in line with the FEC's own position prior to the initiation of the present case. The FEC had consistently held that while unopposed elections could be "elections" under the statutory definition where the sole candidate had no opposition from the outset, in order to allow unopposed candidates in primaries to keep in the public eye along with the opposing party's candidates who would be actively campaigning during this period, elections in which there was opposition were over as soon as the winning candidates opposition was eliminated.

Thus, in the case of Connecticut's statutorily enacted 20 percent rule, for example, if only one candidate emerges from the convention then that convention

was held by the FEC to be "tantamount to an election" under 2 U.S.C. 431 (1)(B) unless some "challenge" is actually filed or mounted by an excluded candidate who did not get the 20 percent.[10]

True, the FEC subsequently did issue an advisory opinion attempting to justify its sudden switch in this case. But that was clearly a self-serving exercise pendente lite. This further illustrates FEC misuse of the Advisory Opinion

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10 AO 1975-54(CCH Fed. Elec. Camp. Fin. Guide Par. 5165; AO 1976-58(CCH FECFG Par. 5211); AO 1978-25(CCH FECFG Par. 5315; AO 1978-30 (CCH FECFG Par. 5325). The rule of the FEC itself prior to this case was that "There is a single contribution and expenditure limitation for the nominating process, regardless of whether the process includes a convention, primary or other procedure." We think it obvious that, in a democracy, if there is only one primary opponent for a powerful incumbent, once that single opponent is eliminated effectively, as by exclusion from the ballot when running against a powerfully entrenched political media-machine, the primary contest is over. To hold otherwise is to blink reality which this Court is not required to do.

mechanism, which the appellant assails in his constitutional challenges. It is arbitrary and capricious and abusive of discretion for the FEC to be allowed to make such a change of course.

Thirdly, an examination of the issues in the case does not leave much of a basis for contending that the convention did not have authority to nominate a candidate. In fact, it did nominate Senator Kennedy.

The statutory definition of 2 U.S.C. 431(1)(B) does not specify from whence the nominating authority must come. Here it came from the state committee chairman and the official in charge of ballot access. The simple fact that the authority is ultimately found to be not invalid does not make the authority any less effective for the statutory purpose at the time that it was exercised. To hold otherwise would encourage illegal and unconstitutional activity in order to evade FECA.

The language of the state statutory definition is clear and unambiguous. Indeed, it was changed from language that defined a convention "held to nominate" a candidate as an "election" t(the present language, which specifies a convention with "authority to nominate" as an election. The change can have been made for no other reason than to stop parties from holding conventions that nominally had some purpose other than nominating a candidate, but managed to do so. The FEC has obscured this clear definition by asserting that the possibility of a write-in campaign converts it to one that does not have authority to nominate. In contrast, it is manifestly the province of the courts to declare what the law is. Marbury v Madison, 2 US (1 LCranch) 60, 73.(Cranch 170); Allied Chemical & Alkali Workers v PPG Co., 404 US 157, 182.

Further, we think that undue deference to an administrative agency such as the FEC, which does not deal in an area of great technical expertise, such as FERC does, for example, is not warranted in this instance. The government ought not to seek to complicate matters which are so close to the American people and so readily comprehe. sible to them as the right to ballot access and to vote.

Next we turn to what is really the second case on which cert is being sought, the appellant Hopfmann's claims stemming from his challenge to provisions of the FECA under 2 U.S.C. 437h. There is some overlap in that his claims about improper usurpation of the congressional power to set the procedures for the inferior federal courts stem both from the failure on the part of the district court, which he alleges, to follow the mandate of 2 U.S.C. 437h regarding expedition, and the

failure which he alleges in the case of his appeal of the dismissal of his administrative complaint to follow the expediting requirement of 2 U.S.C. 437g.

2 U.S.C. 437h means what it says. It is both procedural and jurisdictional in its command. The lower courts, in this instance, have virtually stripped its command of meaning and made it clear that they will not obey its "bypass" of the first two levels of the normal procedural process of the federal courts. This establishes a dangerous precedent of courts acting on their own to alter, in effect, the wishes of Congress in regard to the procedure and jurisdiction of the inferior federal courts.

Some very old, and long-controlling precedents of this Court would be overturned, or at least threatened in this circuit by these decisions of the district and circuit courts being allowed to stand.

Wayman v Southard (1825) 23 US 1; Keary v Farmers and Merchants Bank (1842), 41 US 89; Railway Co. v Whitton's Adm'r (1872), 80 US 270 (Congress determines procedure for the courts) Jecker v Montgomery (1852), 54 US 498; Ex Parte McCardle (1869), 7 Wall 506, 514; Kline v Burke Constr. Co., 260 US 226 (1922) (Congress determines the jurisdiction of the inferior courts.) Such chipping away at the separation of powers upon which our form of government is based should not go unreviewed by this Court.

Further, the matter of the conflict between the opinion of this Court in Bread Political Action Committee v FEC, 455 US 577 (1982), wherein it was commanded that the clear language of the FECA should be adhered to unless there clearly appeared from the legislative history some reason for doing otherwise and the expansion of the in forma pauperis statute, 28 U.S.C.

1915, through footnote 14 in California Medical Association v FEC, 453 US 182, as interpreted by the FEC and lower courts in this instance should be resolved. The judicial activism of the courts of the D.C. circuit in this regard has created an asserted power on their part which appears to violate the constitutional scheme in its most basic tenet, the "separation of powers". This must be cleared up. Clearly Congress commanded the bypass of the first two levels of the system in this unusual provision.

There is a question of unjustified judicial activism in expanding the specific "frivolity provision" of the in forma pauperis statute through footnote 14 in California Medical to apply to the FECA, in which there is no such language, and to the petitioner, who is not proceeding in forma pauperis. Note 14 in California Medical refers principally to,

and relies upon, a district court case which applied specifically the in forma pauperis statute "frivolity provision" imposing a threshold "frivolity" test upon poor litigants. The other case cited in that footnote is cited "cf" not as being directly on point. This development of a footnote (which appears to be taken out of context) into a mandate that destroys the Buckley Provision must be examined by this Court. There is a conflict between the intepretation which the FEC and the lower courts in this instance have placed upon this footnote 14 in California Medical, and hence upon that case, and the unanimous, and more recent holding of this Court in Bread Political Action Committee wherein this Court stressed that the plain meaning of the language of 2 U.S.C. 437h must be adhered to unless there is legislative history that requires an interpretation that deviates from that

plain language.

The mandate that "all" constitutional questions raised about the FECA must be certified "immediately" to the full panel of the court of appeals sitting en banc would appear to mean what it says. And no legislative history to the contrary has been shown.

We turn to the substance of Mr. Hopfman's constitutional challenges to the FECA. They are questions which have previously been raised in congressional testimony, on the floor of Congress, or in other litigation, and still have not been answered. To attack Mr. Hopfmann for raising them appears to us to be an attempt by the FEC to prevent its enabling statute from undergoing precisely the kind of scrutiny that Congress intended its provisions to have when it enacted 2 U.S.C. 437h. The treatment of Mr. Hopfmann resembles the treatment accorded

the plaintiff in the New York case which led to Senator Buckley's desire to pursuade his colleagues to pass the provision which now bears his name.[11]

We have discussed above the FEC's assertion of judicial power in this instance, both in its use of advisory opinions and in its attempts to affirm holdings of the Massachusetts Supreme Judicial Court upon the Federal Constitution. In this it appears to be violating the "Separation of Powers" doctrine of the Constitution, the "case or controversy" requirement of Art.III, the requirement of Art.I,Sec. 5, Cl.1 that each house shall judge of the election of its members.

The challenge to the advisory opinion provisions of the FECA and to the non-

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11 Pichler v Jennings, (1972, SDNY) 347 F.Supp. 1061.

voting membership on the FEC of the Secretary of the Senate are two more of the constitutional challenges raised by the petitioner. It is hard to imagine two provisions of the FECA that are more in need of examination by this Court. At the time of the floor debate on the 1976 FECA Amendments, there were over a hundred instances already accumulated in which it appeared that the FEC had used the advisory opinion power to bypass the formal rulemaking proceeding mandated in federal law for administrative agencies.[12]

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12 S. 3065 of 1976, which became the 1976 Amendments, as reported out of committee, had a provision, crafted after lengthy hearings delving into the problems created by the AO's and the FEC's continued use of them to create general rules of law, that would have required the FEC, whenever it used the AO to create a general rule of law, as it had been doing then and has been doing since, to, within 30 days, adopt an actual rule or regulation incorporating the rule thus surreptitiously announced. This provision was defeated on the floor on grounds of procedural impracticality, but not before

Since Mr. Hopfmann commenced his case, we have witnessed the FEC in litigation use its advisory opinion power to challenge a 4-4 tie affirmance by this Court. Thus, an Advisory Opinion was erected into law in a manner to defy even the rulings of this Court, without the "case or controversy" required by the Constitution.

(Continued)

it was made amply clear that there was a real constitutional problem. See Congr. Rec. Vol. 122, Part 6, 94th Congress, 2d Session, Mar. 16, 1976, p. 6693. See particularly Sen. Griffin's remarks that over 100 of the past AO's of the FEC had actually been rules or regulations. See also pages 6940-41-42-43. See particularly the testimony of Brice M. Claggett, Esq., who had been the lead attorney for plaintiffs in Buckley v Valeo, 424 US 1, (1976) which had just then struck down a good part of the FECA. Mr. Claggett pointed out with cogency the problem that was raised by the FECA's advisory opinion powers in that they resulted in general rules which were not necessarily laws at all but which left the party affected by them in a position as if they were law but without any way of challenging their illegality.

Further, we ask this Court to imagine what reaction there would be if the Congress should pass a law providing for a member of one of the judiciary committees to sit in ex officio on the deliberations of the members of this Court, without a vote, mind you, but sit in nonetheless. The fact of that individual's not having a vote would scarce make the matter any less a violation of the constitutional balance of powers. Yet that is just what Mr. Hopfmann challenges in the FECA, a violation of the separation of powers that is clear.

The complication that Mr. Hopfmann's complaint is against a long-term member of the very body which the ex officio member serves as an employee makes it all the clearer that this question is a serious one that needs to be examined.[13]

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13 Remarks of Antonin Scaglia,

The burdens that the FECA places upon a non-incumbent candidate injured by a violation of its provisions are so heavy, as this case illustrates, that the equal protection clause of the Fifth Amendment as contained in its requirement for due process is violated and the First Amendment right to petition for the redress of grievances is wrongfully taken from the injured party.

We submit that petitioner has raised questions that deserve consideration that they did not get. At the outset he raised a substantial question about whether the "Jaybird" type of pre-primary convention that a legislature rejects is an election under 2 U.S.C. 431 (1)(B). He proceeded

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(Continued)

Assistant Attorney General, on behalf of the Ford administration: Legislative History of the 1976 Amendments, p. 119 et seq., citing this Court's opinion in Weiner v U.S., 357 US 349, 355-356 (1958). See the remarks of the Hon. Walter Mondale, Senator from Minnesota.

to raise other substantial questions. The treatment he has received, and the precedents that the courts established in the offhand manner in which they treated his arguments, raise disturbing questions about our judicial system and its position among the three co-ordinate branches of the government and its treatment of those who dare to challenge an administrative agency which appears to have exceeded the bounds of constitutional authority. Where Congress has sought to give him an avenue for that challenge, he has met roadblocks.

For the foregoing reasons, the writ of certiorari should be granted in this case.

Respectfully submitted,

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202/ 628-1114

CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by hand, this 17th day of October, 1985, true and accurate copies of this Petition for the Writ of Certiorari, three in number, upon Charles N. Steele, Esq., General Counsel of the Federal Election Commission, 1325 K Street, N.W., Washington, D.C., and upon William Oldaker, Esquire, counsel for Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, 1140 19th Street, N.W., Washington, D.C., upon the Honorable Edwin P. Meese, Attorney General of the United States, at the Main Justice Building, Department of Justice, Washington, D.C., 12th and Pennsylvania Ave., N.W., and upon the United States Attorney for the District of Columbia, United States Court House, 4th and Constitution Avenue, N.W., Washington, D.C.

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Laurence A. Elgin